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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1213

ROBERT WILLIAM DELANEY,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

ALFRED I. HOPKINS
1701 Meridian Avenue
Miami Beach, Florida

IRMA ROBBINS FEDER
110 N. Hibiscus Drive
Miami Beach, Florida

RICHARD YALE FEDER
1099 Ponce de Leon Boulevard
Coral Gables, Florida
Attorneys for Appellant

MAURICE ROSEN
16924 N. E. 19th Avenue
North Miami Beach, Florida
Of Counsel

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IN THE

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October Term, 1966

No.

ROBERT WILLIAM DELANEY,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Florida filed September 28, 1966 and set forth hereinbelow and respectfully submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Florida is re-

ported at 190 So.2d 578, and is set forth in the Appendix hereto.

JURISDICTION

These proceedings began with an indictment returned against Appellant which charged that he did "commit the abominable and detestable crime against nature per os" with a woman. Appellant entered a plea of not guilty, filed motions to quash and dismiss, which were denied, was tried before a jury on June 17, 1963, and a mistrial resulted. Thereupon Appellant filed a further motion to dismiss, which was denied, was brought to trial a second time before a jury on January 6, 1965, and the jury returned a verdict of guilty of an attempt to commit the abominable and detestable crime against nature. On May 18, 1965 the trial court, being the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida, entered an Order of Probation withholding adjudication of guilt and placing Appellant on probation for a period of five years. Appellant then took an appeal to the Supreme Court of Florida, which assumed jurisdiction of the cause, and on September 28, 1966 affirmed the judgment of the trial court. Notice of Appeal to this Court was filed with the Supreme Court of Florida on December 27, 1966 and by Order dated February 24, 1967 that court granted Appellant an extension of time until April 1, 1967 within which to docket the cause in this Court.

Jurisdiction of this appeal is conferred upon the Supreme Court of the United States by Title 28 U. S. Code, Sec. 1257(2). Cases sustaining the jurisdiction of this Court are *Smith* v. *Cahoon*, 283 U.S. 553; 75 L.Ed. 1264; 51 S.Ct. 582 (1931); *Winters* v. *New York*, 333 U.S. 507;

92 L.Ed. 840; 68 S.Ct. 665 (1948); and *Griswold* v. *Connecticut*, 381 U.S. 479; 14 L.Ed. 2d 510; 85 S.Ct. 1670 (1965).

STATUTE INVOLVED

The validity of Florida Statutes, Section 800.01 is involved, and provides, in full, as follows:

> "800.01 Crime Against Nature; Punishment.—Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years."

Said statute is set forth in Vol.2, 1965 Florida Statutes, page 3523.

QUESTION PRESENTED

1. May the State of Florida under Florida Statutes, Section 800.01, and consistent with the due process clause of the Fourteenth Amendment, and pursuant to its police powers to protect the public health, safety and welfare, punish consenting adults who allegedly attempt to commit the act of cunnilingus in private, or does said statute and the punishment thereunder violate the due process clause by (a) unconstitutionally invading the public's right of privacy and (b) unconstitutionally contravening the guarantees of freedom of religion and separation of church and state?

2. Does Florida Statutes, Section 800.01, if construed to apply to consenting adults allegedly attempting to perform cunnilingus in private violate the due process clause

of the Fourteenth Amendment (a) in being void for vagueness; (b) by failing to give due notice of the criminally proscribed conduct; and (c) by its overbreadth sweeping within its ambit protected as well as unprotected conduct and relationships?

STATEMENT

Appellant and Appellee, in connection with the appeal to the Supreme Court of Florida, stipulated to a narrative of testimony in the record-on-appeal to that Court, viz.:

"The testimony of the State's witnesses was designed to show that the Defendant committed the abominable and detestable crime against nature in the following manner:

In the late evening of February 9, 1963, or in the early morning of February 10, 1963, the Defendant entered a motel room at the Lakeshore Motel in Tallahassee, Florida. Occupying the room was an adult female, using the name Jan Lee, who was in the employ of the Legislative Investigating Committee. The State's testimony was designed to show that in that motel room the Defendant committed the crime with which he was charged by inserting his tongue into the vagina of Jan Lee. There was no evidence of force or duress on the part of the Defendant. Stationed in the adjoining room were two police officers who stepped into the room at the appropriate moment to take photographs of the Defendant and Jan Lee."*

At the conclusion of the second trial, as noted above, the jury returned the following verdict:

*The argument of entrapment was not before the Supreme Court of Florida, and consequently is not presented in this statement.

> "We, the jury, find the defendant guilty of an *attempt* to commit the abominable and detestable crime against nature." (Emphasis supplied)

HOW FEDERAL QUESTION IS PRESENTED

In his Motion to Quash dated June 12, 1963, filed prior to his first trial, Appellant urged that:

> "The Statute under which prosecution of this cause has advanced is so vague and indefinite as to be completely incomprehensible as a charge of any crime against any man and that the indictment based thereon should, therefore, be quashed."

This Motion was denied by Order dated June 14, 1963. Prior to his second trial Appellant filed a Motion to Dismiss dated December 16, 1964, wherein he urged that:

> "The statute under which the Defendant has been indicted is so vague, indefinite, and ambiguous that a man of ordinary intelligence is forced to guess at just what conduct is prohibited by that Statute and the Statute being so vague and indefinite, therefore, deprives the Defendant of due process of law and violates his rights under the Constitution of the State of Florida and the Constitution of the United States."

This motion was denied by Order dated January 6, 1965. On appeal to the Supreme Court of Florida Appellant contended that:

> "if the statute be construed as prohibiting such an act committed *per os*, it is invalid because it constitutes an attempt to create a new crime by language too vague and indefinite to apprise a person of what is prohibited . . . [and this] makes the statute void because of vagueness in violation of due process standards of both state and federal constitutions." 190 So.2d 578, 581.

The restrictions imposed upon Appellant pursuant to the trial court's Order of Probation including restrictions upon his residence and employment, are set forth at length in said Order dated May 18, 1965.

THE FEDERAL QUESTION IS SUBSTANTIAL

1. **The Issues of Privacy and Religious Freedom.** Appellant submits that the State's police power encompasses no legitimate interest in penalizing adult, private, consensual sexual conduct, and interference with or regulation of sexual conduct is not a legitimate state purpose absent a minor, public display or use of force.* See, e.g., the *American Law Institute's* Model Penal Code and recommendations; England's *"Wolfenden" Report of the Committee on Homosexual Offenses and Prostitution*, (CMOD No. 247, 1957), *"Report to the Hague — Suggested Revisions of Penal Law Relating to Sex Crimes and Crimes Against the Family"* (Morris Ploscowe, 50 Cornell Law Quarterly 1965, p. 425 et. seq. — particularly the section respecting Resolution No. 6).

The statute, Section 800.01, cannot find justification,

*And it should be noted that Appellant is discussing Section 800.01 only with reference to conduct between human beings, not animals.

in terms of "natural law" by defining acts as "natural" or "unnatural" in accordance with religious prosciptions. See, e.g., *"Sodomy — Crime or Sin?"* 12 University of Florida L. Rev. p. 83 et seq. (1959 Note by Richard T. Jones), stating that the statute is derived from the Old Testament's command that "Thou shalt not lie with mankind as with womankind: It is abomination . . . " While a state law based on an independent, non-religious legitimate purpose may constitutionally interfere with or be consistent with religious proscriptions, *Reynolds v. United States*, 98 U.S. 145; 25 L.Ed. 244 (1879); *Griswold v. Connecticut, supra*, dissenting opinion of Justice Stewart, fn. 2 at p. 529, nevertheless, religion in and of itself cannot supply a legitimate state purpose, *Abington Township v. Schempp*, 374 U.S. 203; 10 L.Ed. 2d 844; 83 St.Ct. 1560 (1963); *Chamberlain v. Dade County*, 374 U.S. 487; 10 L.Ed. 2d 1043; 83 S.Ct. 1864 (1963).

Assuming that fostering of the noble association of marriage *is* a legitimate state purpose, *Griswold v. Connecticut, supra*, such purpose cannot be ascribed to the "crime against nature" statute, since it applies equally to sexual acts committed inside *and* outside the marital relationship. Indeed, modern marriage authorities often recommend oral-genital activity. See *"Sodomy — Crime or Sin?"*, *supra*, 12 University of Florida L. Rev. at p. 88; *"Deviation and the Criminal Law,"* 55 Journal of Criminal Law, Criminology, and Police Science, p. 441 et. seq., pp. 447-448 (1964 article by Donald J. Cantor), and authorities cited in both texts.

Viewing the statute from the prospect of "means" rather than "end", it is clear that it is neither "necessary" or "rationally related" to the accomplishment of a per-

missible state policy", *(Griswold v. Connecticut, supra,* opinion of Justice Goldberg at p. 497, relying on *McLaughlin v. Florida*, 379 U.S. 184, 196; 13 L.Ed. 2d 222; 85 S.Ct. 283 (1964); *Schneider v. State*, 308 U.S. 147, 161; 84 L.Ed. 155; 60 S.Ct. 146 (1939) and *Bates v. Little Rock*, 361 U.S. 516, 524; 4 L.Ed. 2d 480; 80 S.Ct. 412 (1960) for a required showing of necessity "(w)here fundamental personal liberties are involved"). As mentioned previously, many present-day authorities advocate marital oral-genital sexual conduct as appropriate, healthy, etc. See Kinsey, Pomeroy and Martin, *Sexual Behavior in the Human Male*, (1948), and Kinsey, Pomeroy, Martin and Gebhard, *Sexual Behavior in the Human Female*, (1953).* Again, there is no evidence or reason for deeming pre- or extra-marital heterosexual oral-genital conduct more harmful to the institution of marriage than pre- or extra-marital heterosexual traditional face-to-face sexual intercourse, but Florida's "crime against nature" statute carries a maximum penalty of 20 years' imprisonment, whereas the state fornication statute, Fla. Stat. Sec. 798.03, has a maximum penalty of 3 months or $30, and the state living-in-open-adultery statute, Fla. Stat. Sec. 798.01, has a maximum

*While not factually involved in the case at bar, the question of homosexuality should be noted in terms of the scope and legitimacy of Sec. 800.01, for inversion "is universal, widespread, deeply motivated, and essentially not curable under present conditions (*Deviation and the Criminal Law, supra*, p. 443, 449) and the criminal law in general and Florida's "crime against nature" statute in particular are illegitimate responses to this condition. See "Lord Devlin and the Enforcement of Morals", 75 Yale Law Journal, p. 986, et seq. (May 1966 by Ronald Dworkin) for the proposition that community opinion in this area is not based on a true "moral position" but rather on "prejudice," "mere emotional reaction", "rationalization" and "parroting." See, also, *"Human Sexual Response"* by Masters and Johnson (Little, Brown & Company, Boston 1966), stating that "(s)exuality is a dimension and expression of personality" at p. 301 and attempting throughout to remedy the abysmal lack of medical scientific knowledge concerning heterosexual physiological and psychological sexual responses.

penalty of 2 years or $500. Finally, Florida has a multitude of other statutes relating to sexual conduct.*

Appellant submits that the "crime against nature" statute, which does not come within the State's police power for the reasons stated above, violates the public's right of privacy.

In *Griswold v. Connecticut, supra*, a majority of this Court held unconstitutional a state statute making the use of contraceptives a crime on the ground that the statute invaded the right of privacy of married persons, a fundamental personal right, and basic value implicit in the concept of ordered liberty under the due process clause of the Fourteenth Amendment.

Appellant submits that the broad right of privacy advocated herein is in keeping with the fundamental democratic doctrine that individual freedom shall not be restricted unless it interferes with another's personal liberty, and that the right of privacy upheld in *Griswold* should be extended to the case at bar.

On the religious issue, Appellant submits that the "crime against nature" law violates the constitutional prohibition concerning "an establishment of religion" if based solely on Biblical or other religious proscriptions. In addition, the statute prohibits the free exercise of religion in the sense that some of the conduct it proscribes is per-

*Fla. Stat. Chapter 794 — *Rape*; Ch. 795 — *Enticing Away Unmarried Women*; Ch. 796 — *Prostitution*; Ch. 797 — *Abortion*; Ch. 798 — *Adultery & Fornication*; Ch. 799 — *Bigamy*; Ch. 800 — *Indecent Exposure; Unnatural & Lascivious Act; Exposure of Sexual Organs; Lewd, Lascivious or Indecent Assault or Act Upon or in Presence of Child*; Ch. 801 — *Child Molester Law*.

missible in some religions, and particularly so in view of the broad scope now given the word "religion." See *United States v. Seeger*, 380 U.S. 163; 13 L.Ed. 2d 733; 85 S.Ct. 850 (1965).

2. **The Issue of Vagueness.** Appellant submits that Florida Statutes, Section 800.01 is void for the reason that it is not only vague, but indeed incomprehensible in that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Lanzetta v. New Jersey*, 306 U.S. 451; 83 L.Ed. 888; 59 S.Ct. 618 (1939); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210; 76 L.Ed. 1062; 52 S.Ct. 559 (1932); *Wright v. Georgia*, 373 U.S. 284; 10 L.Ed. 2d 349; 83 S.Ct. 1240 (1963). The statutory proscription against commission of "the abominable and detestible crime against nature, either with mankind or with beast" cannot possibly be deemed to provide adequate notice to the public (a) that sexual offenses are thereby denoted or connoted, or (b) if same be so implied, the kinds of such offenses necessarily and *exclusively* prohibited thereby, or (c) that heterosexual as well as homosexual acts are included, or (d) the marital, non-marital or extra-marital relationships that may be included or excluded.

Whatever constitutional vitality such a statute may conceivably have in other jurisdictions by virtue of a more limited definition of the crime and its elements at common law, i.e., anal intercourse committed by one man upon another man or by a man upon a beast, it is clear that in Florida buggery and bestiality do not exhaust the potential ambit of the statute. The Supreme Court of Florida stated in *English v. State*, 164 So. 848 (1935) that the offense denounced by this statute "is not merely the com-

mon-law crime against nature, but includes other acts of bestiality", and the Court further stated in *Fine v. State*, 14 So.2d 408 (1943) that "the latitude of the act has been broadened to cover odious sexual relations not originally considered a commission of the crime against nature." Indeed, as the Court announced in *Fine v. State:*

> "We have experienced some difficulty in determining precisely what unnatural sexual acts do, and what do not, constitute the crime. This is largely due to the reluctance legal authors have shown to detail the facts they were considering, because they are always so shocking." 14 So.2d 408, 409.

The few reported Florida decisions reflect convictions upheld for the following acts and circumstances:

(a) Commission of the crime "per os" by the male defendant with another male (but without stating whether the "os" was that of the defendant or the other male). *English v. State*, 164 So. 848 (1935).

(b) The male defendant, aged 76, allowed two girls, aged 11 and 13, to perform fellatio upon him, and he in turn performed cunnilingus upon them. *Lason v. State*, 122 So.2d 305 (1943).

(c) The male defendant, age 70, performed cunniligus upon a little girl, the court characterizing same as "copulation" per os. *Fine v. State, supra.*

It has also been held that penetration is a necessary element of the crime, *Swain v. State*, 172 So.2d 3 (1965),

but that emission is not a necessary ingredient, *Drawdy v. State*, 120 So. 844 (1929).

In view of the meaningless language of the statute and in view of the expanding judicial gloss upon it, it is clear that no discerning, intelligent adult can with any reasonable degree of certainty define any limits upon the kinds of proscribed acts, or the relationship or status of the persons involved. With all due respect to the Court, and recognizing the delicacy of the subject matter, Appellant must, necessarily, amplify upon the foregoing. What, indeed, are "unnatural sexual practices"? As noted above, the variety or poverty of sexual experiences in our society, including prodromal activity as well as consummated orgasm, depends upon numerous cultural, educational, religious and psychological determinants. Thus, heterosexual genital contact may be genital-genital, oral-genital, anal-genital, manual-genital, genital-mammary, genital-axillary, genital-gluteal, etc., ad infinitum. The variety of postures and positions of simply genital-genital intercourse are exhaustively detailed in innumerable manuals and treatises, both occidental and oriental, both ancient and modern. And what may be joyous or refreshing variety for some, may, for others, be unnatural, abominable and detestable. *De gustibus non disputandum est.*

Further, while the Florida cases have included both homosexual and heterosexual relationships, there is nothing in the Florida cases to indicate that the statute may not be applied (a) to married couples, or (b) to unmarried, consenting heterosexual adults in private, or (c) to solitary masturbation, or (d) to genital intercourse with contraceptive devices. Indeed, some traditional religions view the

latter two categories as "crimes against nature" because they defeat nature's purpose of procreation.

The statute is therefore void on its face, since "men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." *Winters v. New York*, 333 U.S. 507, 515; 92 L.Ed. 840, 850 (1948). Accord: *Aptheker v. Secretary of State*, 378 U.S. 500; 12 L.Ed. 2d 992; 84 S.Ct. 1659 (1964); *Thornhill v. Alabama*, 310 U.S. 88; 84 L.Ed. 1093; 60 S.Ct. 736 (1940). And as the Dissenting Justices stated in the recent case of *Phillips v. State*, 35 Law Week 2461 (Indiana, 1967)

> "The statute should spell out in language understandable by the person of average scholastic attainment and intelligence the specific nature of the crime with which he is charged. If that cannot be done, it should not be denominated a crime."

And where, as here, the crime denounced is an *attempt* to violate an incomprehensible statute, the constitutional infirmity is all the more blatant and outrageous, for where can an *attempt* to commit the crime be said to commence?

The vice of vagueness lies not only in its lack of notice, for purposes of particular prosecutions, but also in the threat it poses, and provides for the unscrupulous. Thus, in the realm of freedom of speech the Court has declared that: "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local

prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v. Alabama, supra,* 84 L.Ed 1093, 1100. Cf. *Hague v. C.I.O.* 307 U.S. 496, 516; 83 L.Ed. 1423, 1437 (1939); and the Dissent in *Phillips v. State, supra,* where the dissenting Justices declared that:

> "It is to be hoped that the Legislature will either clarify or abolish this anachronism reminiscent of the haydey of the witch hunts of early colonial times."

The "witch hunt" nature of this prosecution is all too clear from the Statement, above, viz.: "Stationed in the adjoining room were two police officers who stepped into the room at the appropriate moment to take photographs of the Defendant and Jan Lee [a government agent]." Compare the police invasion condemned by the Court in *Mapp v. Ohio,* 367 U.S. 643; 6 L.Ed. 2d 1081; 81 S.Ct. 1684 (1961).

Further, is the obvious fact that the statute, does not, either by its terms or by its judicial gloss, exclude, and could well be applied to, *married couples* within the privacy of their homes. The statute, therefore, by its overbreadth, violates due process. Thus, in *Griswold v. Connecticut,* 381 U. S. 479; 14 L.Ed. 2d 510; 85 S.Ct. 1670 (1965), the State law forbade the use of contraceptives and sought "to achieve its goals by means having a maximum destructive impact" upon the marital relationship.

> "Such a law cannot stand in light of the familiar

> principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP v. Alabama*, 377 U.S. 288, 307. . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." 14 L.Ed. 2d 510, 515-516.

As the Court said in *Wright v. Georgia*, *supra*, "a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible application of the statute." 10 L.Ed. 2d 349, 355. Accord: *Winters v. New York*, *supra*, 92 L.Ed. 840, 846; *Thornhill v. Alabama*, *supra*, 84 L.Ed. 1093, 1100.

The Supreme Court of Florida, in its opinion below, held that Appellant had adequate notice by virtue of prior judicial construction of the statute, as including "copulation per os" and not being confined to "copulation per anum". 190 So.2d 578, 581-582. However, the only Florida cases heretofore decided and specifically describing acts of cunnilingus are *Lason v. State*, *supra*, and *Fine v. State*, *supra*, and in both of which cases the females were *little girls*. The female in the instant case is not a minor, but is an adult woman, and Appellant submits that whatever "notice" may constitutionally be gleaned from the latter decisions, they certainly could not be deemed to notify the

public that the statute also embraced a private, consensual, *adult* relationship. Indeed, where rape is concerned, the statutory proscriptions in Florida, as elsewhere, clearly distinguish between forcible intercourse on the one hand, and consensual relations where a mere child is involved. Florida Statutes, Sections 794.01 and 794.05.

Moreover, even prior judicial gloss is not the answer, for in *Wright v. Georgia*, *supra*, the State there also contended that "the petitioners were forewarned that their conduct would be held to violate the statute. See *Samuels v. State*, 103 Ga. App. 66, 118 S.E. 2d 231." But this Court held that "it is sufficient to say again that a generally worded statute, when construed to punish conduct which cannot be constitutionally punished, is unconstitutionally vague." 10 L. Ed. 2d 349, 355-356. In that earlier case of *Samuels v. Georgia*, a group of Negroes had staged a sit-in at a lunch counter, had refused to leave at the command of the police, and were arrested and convicted for disturbing the peace. The Georgia Court had held that, notwithstanding the defendants' peaceful conduct, they were still guilty of the crime of disturbing the peace in that they "were bound to know that their acts might result in violent opposition by the white people of the local community." 118 S.E.2d 231, 233. The Georgia Court in *Wright* had held that the Negroes there involved were charged with the prior judicial interpretation of the breach of the peace statute and thus given adequate notice; but this Court disagreed and held the statute to be unconstitutionally vague. Cf. *Hague v. C.I.O.*, *supra*, where the prior judicial gloss of the New Jersey Supreme Court in *Thomas v. Casey*, 121 N.J.L. 185, 1 A. 2d 866, did not save the ordinance from being declared void upon its face. 83 L. Ed. 1423, 1437. Indeed, in *Winters v. New York*, *supra*,

the Court stated that "we assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation". 92 L.Ed. 840, 849.

Moreover, there is no question as to Appellant's standing to challenge the statute. "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433; 9 L.Ed. 2d 405, 418; 83 S.Ct. 328 (1963). Accord: *Aptheker v. Secretary of State*, *supra*, 12 L.Ed. 2d 992, 1003.

3. **Summation.** The importance of the constitutional questions just set forth can be measured in many ways. Obviously the number of persons to whom the "crime against nature" statute applies, whether or not actual prosecution occurs, is overwhelming. Surely the "utilitarian" position (emphasizing lack of social harm in the conduct prohibited, unenforceability of the law, and abuse of the law through blackmail and extortion) and the "moral activist" view (that the preservation of society requires criminal sanctions for all conduct the community deems highly sinful or immoral)* reveal part though not the whole of the jurisprudential problem involved. Perhaps the importance of the questions posed is obscured by their

*See e.g. *Book Review* (*of "Law, Liberty and Morality by A. L. A. Hart*), 55 Journal of Criminal Law, Criminology and Police Science p. 393 et. seq. (1964 by C. R. Jeffery); "*Lord Devlin and the Enforcement of Morals*," 75 Yale Law Journal p. 986 et. seq. (May 1966 by Ronald Dworkin).

failure to ask whether the various conduct involved is "right" or "wrong." But is not "liberty" a matter of individual choice to act "rightly" or "wrongly" according to one's values or morals when the action or failure to act does not threaten the liberty of others? Under such circumstances does not the question of proper, appropriate, desirable adult private consensual sexual conduct belong in religious, social, and philosophical areas rather than in the area of criminal law?

Appellant submits that Section 800.01 and this prosecution under it are Medieval in concept, and alien to our contemporary standards of due process and personal freedom. The conduct which the State of Florida seeks to punish is not a legitimate governmental concern of the State or society. To hold otherwise would be but another step towards subjecting all Americans to the prurient eye and malevolent fist of Big Brother, the arch-foe of the Bill of Rights.

CONCLUSION

For the foregoing reasons, Appellant submits that the questions here presented are substantial and of great public importance and warrant plenary consideration by this Court.

Respectfully submitted,

By_____

ALFRED I. HOPKINS
1701 Meridian Avenue
Miami Beach, Florida

IRMA ROBBINS FEDER
110 N. Hibiscus Drive
Miami Beach, Florida

RICHARD YALE FEDER
1099 Ponce de Leon Boulevard
Coral Gables, Florida
Attorneys for Appellant

MAURICE ROSEN
16924 N. E. 19th Avenue
North Miami Beach, Florida
Of Counsel

CERTIFICATE OF SERVICE

I, ALFRED I. HOPKINS, Counsel for Appellant and a member of the Bar of the Supreme Court of the United States, hereby certify that on March __, 1967, I served a copy of the foregoing Jurisdictional Statement on the Appellee by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Hon. Earl Faircloth, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

ALFRED I. HOPKINS

APPENDIX

ROBERT WILLIAM DELANEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 34541.

Supreme Court of Florida.

Sept. 28, 1966.

PER CURIAM.

On trial by jury the appellant was found guilty of an attempt to commit "the abominable and detestable crime against nature," in violation of F.S. Section 800.01, F.S.A. Instead of adjudging the appellant guilty and imposing sentence on him the trial judge entered an order which withheld adjudication of guilt and placed appellant on probation for a period of five years. In doing so the judge acted pursuant to F.S. Section 948.01, F.S.A. It is this order which is before us for review by way of appeal.

In taking his appeal directly to this court the appellant proceeded on the theory that we have jurisdiction because the trial court, in denying pre-trial motions to dismiss the indictment under which he was tried, passed directly upon the validity of F.S. Section 800.01, F.S.A. as it applies to this appellant under the facts of this case.

The appellee-State argues that this court does not have authority to entertain this appeal because our ap-

pellate jurisdiction in criminal matters is limited to review of final judgments and the probation order here involved is not a final judgment.

[1, 2] The state is correct in arguing that the finality of a judgment is generally measured by whether it marks an end to the judicial labor in the cause. Slatcoff v. Dezen, Fla.1954, 72 So.2d 800; State v. Barone, Fla. 1960, 124 So.2d 490. It is true, as the State points out, that if any one of a number of circumstances occurs the trial court may thereupon resume jurisdiction over the defendant-appellant and enter other orders, including a judgment adjudicating guilt and passing sentence.

[3] Prior to the passage, by the 1959 Legislature, of the present Section 948.01 an accused could be placed on probation, but only after a formal adjudication of guilt by the court. Thus only the imposition of sentence could be withheld. Under the new section the court may place on probation a defendant who has pleaded guilty or nolo contendere, or been found guilty after trial, without first entering a judgment of guilt of conviction.

[4] The obvious purpose of the new procedure was to provide for the rehabilitation of one who had committed a crime without formally and judicially branding the individual as a convicted criminal with consequent loss of civil rights and other damning consequences.

The legislature wisely recognized that this new procedure could precipitate argument over whether a probation order entered without adjudication of guilt was a final or appealable order. To forestall any confusion it amended F.S. Section 924.06(2) F.S.A. to grant an individual sub-

ject to such an order the right of appeal therefrom " * * * in the same manner and with the same scope and same effect as if judgment of conviction had been entered and appealed from." However, the fact that such an order is appealable is not enough to satisfy the constitutional limitation that permits this court to review by appeal only "final judgments or decrees."

[5] Whether a probation order entered after final judgment of conviction would be a final order in the appellate sense we are not required to answer now. We are concerned here only with a case in which the sole order entered in and dispositive of the defendant's rights is a probation order. We have concluded that in such a case the probation order must be considered, at least for purposes of appeal, to be a final order. We do this realizing that if such order be later revoked it could be followed by a final judgment of conviction and sentence. Treating such a probation order as a final order is unusual, but then the procedure which allows disposition of a criminal proceeding without a formal and final judgment of conviction is also unusual. We think the unusual procedure requires the unusual result we have reached.

One of the more obvious practical reasons which leads us to hold this probation order to be a final judgment for appeal purposes is that it is necessary where the facts warrant to give the appellant, in this and every like case, the right of appeal to that court which has constitutional authority to review orders passing upon the validity of a statute or construing a constitutional provision. In the instant case, if we were to hold that the subject order is not appealable to this court, it would have to go to a district court of appeal, which court would not have authority to

review the orders passing on the validity of the statute. Moreover, if the subject order were not considered to be a final order, it could be argued with force and logic that review of that order would not extend to previous orders such as those denying the motions to quash in this cause. Add to this the fact that we have no provision allowing review of pre-trial interlocutory orders in criminal cases and it becomes apparent that to construe such an order as the one here presented to be anything other than a final order could deny the person subject thereto the appellate review which the legislature obviously intended that he have.

[6, 7] This conclusion requires that we next determine whether the order presents a question within our jurisdiction to review. The State does not contend that we lack jurisdiction because the order appealed from does not pass upon the validity of a state statute. Nevertheless, we mention, in passing, that a final judgment, as we hold this one to be, brings with it for review the prior orders entered in the cause. In this instance the two orders denying the motions to quash the indictment, each of which in effect upheld the validity of F.S. Section 800.01, F.S.A., traveled forward with the order of probation and satisfy the jurisdictional requirement.

Turning to the merits, appellant cites respectable authorities in support of his argument that at common law the "abominable and detestable crime against nature" could only be committed *per anum* and not *per os*. In this case appellant was charged with having committed the act *per os*. Alternatively, he contends that (1) if Section 800.01 be construed as prohibiting only the common law offense, i.e., when committed *per anum*, the indictment was

defective because it charged no crime; or (2), if the statute be construed as prohibiting such an act committed *per os*, it is invalid because it constitutes an attempt to create a new crime by language too vague and indefinite to apprise a person of what is prohibited. This, says the appellant, makes the statute void because of vagueness in violation of due process standards of both state and federal constitutions.

[8] The State questions the appellant's reading of the common law as not prohibiting copulation *per os*, but replies that, in any event, this court long ago construed F. S. Sec. 800.01 F.S.A. to extend to such acts and that appellant is bound thereby. We agree.

If the construction of this statute were here for the first time it would be necessary for us to determine whether at common law the crime here involved included acts committed per os. It is unnecessary for us to do so now because this court has on several occasions already considered and answered this very question contrary to appellant's contention. Ephraim et al. v. State, 1921, 82 Fla. 93, 89 So. 344; Jackson v. State, 1922, 84 Fla. 646, 94 So. 505; English v. State, 1935, 122 Fla. 77, 164 So. 848; Lason v. State, 1943, 152 Fla. 440, 12 So. 2d 305; Fine v. State, 1943, 153 Fla. 297, 14 So.2d 408; and McElveen v. State, Fla. 1954, 72 So.2d 785.

[9] The real question before us, then, is whether these earlier constructions of the statute have become a part of the statute and the law of this state in the sense that these decisions, together with the statutory language, afforded the appellant sufficient notice that acts committed

per os as well as *per anum* were prohibited by the statute. We hold that they did.

[10] In this state, as in most others, the rule prevails that in reenacting a statute the legislature is presumed to be aware of constructions placed upon it by the highest court of the state, and, in the absence of clear expressions to the contrary, is presumed to have adopted these constructions. Rabinowitz v. Keefer et al., 1931, 100 Fla. 1723, 132 So. 297; Depfer v. Walker, 1936, 125 Fla. 189, 169 So. 660. Indeed, there is substantial authority for the proposition that such reenactment of the statute bars the court from subsequently changing its earlier construction. Rabinowitz v. Keefer, supra; 8.Fla.Jur., Courts, Sec. 152 (1956); 82 C.J.S. Statutes, § 370 (1953). In Johnson v. State, Fla.1956, 91 So.2d 185, we applied this rule to a criminal statute, expressly overruling a contrary construction by dictum in Grimes v. State, Fla.1953, 64 So.2d 920.

We do not agree with appellant that this rule is rendered inapplicable here by the circumstances that our prior construction of the statute is broader than the one he contends for. This argument might have been valid on the occasion of the initial judicial construction, on ground of a violation of the prohibition against *ex post facto* legislation. However, it clearly would not be appropriate as to subsequent applications of the statute as construed. Bouie et al. v. City of Columbia, 1963, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894.

At oral argument, the State struck what we think to be a most telling blow against the appellant's contention that the statute did not afford him notice that such an act *per os* was prohibited, and that this court's construction

thereof in prior cases could not cure the defect. Pointing out that the statute, without further definition, merely prohibits " * * * the abominable and detestable crime against nature, either with mankind or with beast * * *," the State logically posed the question whether it is easier for the public, or a defendant, to determine the nature of this crime by researching the history of the common law or the case law of this state. Although the opinions of this court are not always the essence of clarity, and never as lucid as we would have them, in this instance those previously rendered on this subject clearly advise all people that in this state the abominable crime against nature includes copulation either by mouth or by anus. These decisions are certainly more readily available and more easily understood than the common law.

We conclude, therefore, that Section 800.01, as previously construed by this court in the cited cases, does prohibit the act charged against this appellant, and did and does afford him, and all other persons, notice that the act complained of was a crime in this state with at least the degree of definiteness required by our constitutions.

The order appealed from is affirmed.

THORNAL, C. J., and ROBERTS, DREW and O'CONNELL, JJ., concur.

ERVIN, J., dissents with Opinion.

THOMAS, J., dissents and agrees with ERVIN, J.

ERVIN, Justice (dissenting):

I agree with the State's contention that we are without jurisdiction to hear this appeal.

Section 4(2), Article V of the State Constitution, F.S.A. provides:

> "Appeals from trial courts may be taken directly to the supreme court, as a matter of right, *only* from * * * *final* judgments or decrees *directly* passing upon the validity of a state statute * * *." (emphasis supplied)

For the purpose of an appeal to the Supreme Court there is no final judgment or decree directly passing upon the validity of a state statute in this case. All that the trial court did was to withhold an adjudication of guilt and place the Appellant on probation for five years.

F. S. Section 921.01, F.S.A., defines "judgment" in criminal law as the "adjudication by the court that the defendant is guilty or not guilty."

In Slatcoff v. Dezen (Fla.), 72 So.2d 800, 801, it is stated:

> "* * * Moreover, the test of a final judgment is whether the judicial labor is at an end. Wolf v. Industrial Supply Corp., Fla., 62 So.2d 30; Wolf v. Cleveland Electric Co., Inc., Fla., 58 So.2d 153; Foley v. State, Fla., 50 So.2d 179, 186. * * *"

To the same effect see State v. Barone (Fla.), 124 So.2d 490, 492, footnote 5.

The reason why the order of probation is insufficient as a predicate for this appeal lies in the fact any one or more of the following contingencies may occur:

(1) The Circuit Court may at any time rescind or modify any of the terms or conditions of probation imposed upon the appellant (F.S. § 948.03, F.S.A.).

(2) If, during the said five years, it should appear to said court that further supervision would be beneficial to the Appellant or to society, the said court may by order extend the supervision period for two extra years (F.S. §§ 948.04, 948.06 and 800.01, F.S.A.).

(3) The Circuit Court may at any time cause the Appellant to appear before it to be admonished or commended, and may discharge him from further supervision when satisfied that its action will be for the best interests of justice and the welfare of society (F.S. § 948.05, F.S.A.).

(4) If the Appellant is charged with violating his probation in a material respect, he must be returned to the Circuit Court for a determination of that charge. This may result in revocation, modification or continuance of probation. If it results in revocation, the Circuit Court must adjudge the Appellant guilty and sentence him. (F.S. § 948.06, F.S.A.)

It is true the statutes authorize trial courts to enter orders of probation and expressly authorize appeal therefrom the same as if they were final judgments. See F.S. Chapter 948, F.S.A., and F.S. § 924.06, F.S.A. However, because of the quoted provision of the State Constitution, unless the order of probation has finality and directness

in respect to passing upon the validity of a state statute upon which a defendant's guilt is predicated, it is an insufficient predicate for an appellate review of the case by us.

F.S. Section 948.01(3), F.S.A., authorizes the trial court to either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt and in either event place him upon probation. Since there is no adjudication of guilt in the order or decree sought to be appealed, there is no finality of judgment or decree in respect to the validity of F.S. § 800.01, F.S.A., the statute under attack by Appellant, either in the order or by way of confirmation of an earlier preliminary order in the case passing upon the validity of said section. An adjudication of guilt would settle with finality the unresolved question of the guilt or innocence of Appellant and by necessary implication would relate back and confirm the preliminary order upholding the validity of the statute under which Appellant is charged.

Our appellate jurisdiction is much more limited than is the District Courts' since we must resolve all doubts that the judgment or order sought to be reviewed is a final one directly passing upon the validity of a state statute. An order of probation without adjudication of guilt may have the finality of a judgment or decree as to the matter of probation of a defendant, yet fail to directly and finally pass upon the validity of the state statute under which the defendant is charged. Thus the order of probation in this case may be determined by the District Court to have that degree of finality in respect to the statutory probation of Appellant pursuant to F.S. Ch. 948, F.S.A., to warrant an appellate review of the merits of the order by the District

Court, notwithstanding said order fails through lack of an adjudication of guilt of the Appellant or otherwise to directly and finally pass on the validity of the criminal statute upon which Appellant's alleged guilt is predicated and lodge jurisdiction of this appeal with us. Without an adjudication of guilt contained in or confirmed by a judgment or order dispositive of the case, the question of the validity of the statute remains unresolved and as a consequence our appellate jurisdiction is not invoked.

The appellate jurisdiction of the District Court is much broader than is ours. Conceivably, it could in an appeal or certiorari review of this case determine if fundamental error was committed in the antecedent proceedings, e. g., the procurement of the evidence resulting in the order of probation. Conceivably, also, it might find it necessary in its appellate review to pass upon the validity of the statute under which Appellant is charged. If this is done, a predicate would be laid for our jurisdiction to be invoked to review the constitutionality of said statute.

Accordingly, I believe we should transfer the case to the District Court of Appeal, First District.

THOMAS, J., concurs.

SUPREME COURT

Office-Supreme Court, U.S.
FILED
APR 24 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1966

NO. 1213

ROBERT WILLIAM DELANEY,
Appellant,

-vs-

THE STATE OF FLORIDA,
Appellee.

APPELLEE'S MOTION TO DISMISS APPEAL

EARL FAIRCLOTH
Attorney General
State of Florida
The Capitol
Tallahassee, Florida

REEVES BOWEN
Assistant Attorney General
State of Florida
The Capitol
Tallahassee, Florida

Attorneys for Appellee

IN THE

Supreme Court of The United States

OCTOBER TERM, 1966

NO.————

ROBERT WILLIAM DELANEY,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPELLEE'S MOTION TO DISMISS APPEAL

Comes now the appellee, within thirty days after receipt of the appellant's Jurisdictional Statement, and shows unto the Court as follows:

As appears from the appellant's notice of appeal, which was filed on December 27, 1966, and a copy of which is included in the record, he appealed to this Court—

> ". . . *from the Final Judgment of the Circuit Court in and for Leon County, Florida, entered* in this action on *May 18, 1965*". (emphasis supplied)

The filing of said notice of appeal conferred no jurisdiction upon this Court to review said judgment of the Circuit Court of Leon County, Florida, because that court was not the highest court of the State of Florida in which a decision could be had, within the contemplation of *Title 28, Section 1257, United States Code.* The Supreme Court of Florida was the highest court of Florida in which a decision could be had, as witness the fact that said judgment was actually appealed to the Supreme Court of Florida and affirmed by it on September 28, 1966 (*Robert William Delaney v. State of Florida*, 190 So.2d 578).

The filing of said notice of appeal conferred no jurisdiction upon this Court to review said judgment of the Circuit Court of Leon County, Florida, for the further reason that it was filed on December 27, 1966, one and one-half years after the entry of said judgment on May 18, 1965.

Nor does said notice of appeal confer jurisdiction upon this Court to review said judgment of the Supreme Court of Florida. The appellant's Jurisdictional Statement (p. 1) says that "Appellant appeals from the judgment of the Supreme Court of Florida filed September 28, 1966 and set forth hereinbelow . . .", but it is manifest from said notice of appeal that the appeal was not from that judgment. The notice of appeal does not even hint at appealing from that judgment; to the contrary, it resolutely ties the appeal to the judgment of the Circuit Court of Leon County, Florida.

Furthermore, even if the unstated intention of the appellant was to appeal from the judgment of the Supreme Court of Florida, the appeal would still be subject to dismissal because the notice of appeal did not designate said judgment as the one being appealed from, as is required by the following portion of this Court's Rule 10:

> "2. The notice of appeal . . . shall designate the judgment or part thereof appealed from, giving its date and the time of its entry; . . ."

and because the same Rule 10 provides that:

> ". . . A failure to comply with these requirements will be a sufficient reason for dismissing the appeal. . . ."

WHEREFORE, the appellee moves the Court to dismiss the appellant's appeal.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General
State of Florida
The Capitol
Tallahassee, Florida

REEVES BOWEN
Assistant Attorney General
State of Florida
The Capitol
Tallahassee, Florida

Attorneys for Appellee

PROOF OF SERVICE

I, Reeves Bowen, one of the attorneys for the State of Florida, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of April, 1967, I served a copy of the foregoing Appellee's Motion To Dismiss Appeal on Robert William Delaney, the appellant herein, by mailing the same in a duly addressed envelope, with airmail postage prepaid, to Honorable Alfred I. Hopkins, attorney of record for Robert William Delaney, appellant herein, 1701 Meridian Avenue, Miami Beach, Florida.

REEVES BOWEN
Assistant Attorney General
State of Florida
The Capitol
Tallahassee, Florida

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1213

ROBERT WILLIAM DELANEY,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANT RESPONSE TO MOTION TO DISMISS APPEAL

ALFRED L. HOPKINS
1701 Meridian Avenue
Miami Beach, Florida
IRMA ROBBINS FEDER
110 N. Hibiscus Drive
Miami Beach, Florida
RICHARD YALE FEDER
[illegible] Ponce de Leon Boulevard
Coral Gables, Florida
Attorneys for Appellant

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 1213

ROBERT WILLIAM DELANEY,

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THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANT RESPONSE TO MOTION TO DISMISS APPEAL

The omission in the Notice of Appeal of reference to the opinion of the Supreme Court of Florida was an oversight, and counsel were not aware of it at the time they undertook preparation of, and the filing of, the

Notice of Appeal. It is apparent now, however, that the omission was simply a scrivener's error, and that notwithstanding this omission there has been substantial compliance with Rule 10. Appellee has not been prejudiced and indeed has not suggested any prejudice in its motion[1]. Accordingly, and for the further reasons set forth below, Appellant submits that the omission is a technical irregularity constituting harmless error and not affording a basis for dismissal:

1. Pursuant to the requirements of Rule 11, the Notice of Appeal (a) was filed with the clerk of the court possessed of the record, i.e., the Supreme Court of Florida (and bears the caption of that Court); and (b) was filed within 90 days after the entry of the opinion of that Court.

2. Pursuant to Section 2 of Rule 10, the Notice of Appeal includes a designation to the Clerk of the Supreme Court of Florida — not the clerk of the Circuit Court — of the portions of the record to be certified.

3. The Notice of Appeal and all pleadings subsequent thereto in state court were filed with the Supreme Court of Florida, not with the Circuit Court.

4. Pursuant to Section 1 of Rule 13, Appellant filed a Motion with the Supreme Court of Florida for extension of time for filing the jurisdictional statement, and an order was entered by that Court granting the extension. Neither the Motion nor the Order was contested in any way by Appellee.

---

[1]The motion was received by counsel for Appellant on April 22, 1967.

5. Any ambiguity that may have inhered in the Notice of Appeal was dispelled by the Jurisdictional Statement, which clearly set forth that the judgment under attack was that of the Supreme Court of Florida, dated September 28, 1966, which had affirmed the earlier judgment of the Circuit Court.

Appellant has found no reported decisions construing Rule 10 in circumstances similiar to those at bar—and Appellee has cited none in support of its Motion. Analogous rulings, however, have been made by the Court in certiorari proceedings, in construing the Federal Rules of Civil Procedure, and in construing Rule 37 of the Federal Rules of Criminal Procedure. In addition, Florida law supports Appellant's position. The authorities are as follows:

1. **Certiorari proceedings.** *Callender* v. *Florida*, 380 U.S. 519; 14 L.Ed. 2d 265; 85 S.Ct. 1325 (1965) initially came to the Court on petition for writ of certiorari to the Supreme Court of Florida. The writ was granted and the mandate issued. However, on remand, the Supreme Court of Florida, in its opinion at 181 So. 2d 529 (1966), held that it lacked jurisdiction to comply with this Court's mandate on the ground that (1) the Petitioners had exhausted their state remedies at the level of the District Court of Appeal; (2) the earlier judgment of the Supreme Court of Florida dismissing the appeal to that Court from the judgment of the District Court of Appeal was not a ruling on the merits, but only a holding that it lacked jurisdiction to entertain the appeal; and (3) lacking jurisdiction in the premises, it could not comply with

this Court's mandate by issuing a further mandate in compliance therewith to the District Court of Appeal, and returned the mandate to this Court for clarification. Thereupon, this Court, in 383 U.S. 270; 15 L.Ed. 2d 749; 86 S.Ct. 924 (1966) vacated its earlier order of April 26, 1965, which had granted the writ of certiorari to the Supreme Court of Florida, and treated the papers submitted as a petition for writ of certiorari *to the District Court of Appeal of Florida, First District*, and granted the petition and reversed the judgments.

Rule 22, respecting review on certiorari, provides that a petition to review the judgment of the state court of last resort in a criminal case shall be deemed in time when filed within 90 days after the entry of such judgment. In *Callender* it appears that the Court in effect amended the petition for purposes of directing the writ to the proper court, and Appellant submits that this liberal construction of the certiorari rules should be extended to the case at bar with respect to Rule 10 and that the Notice of Appeal be deemed amended, to reflect its true and obvious intent, as directed to the judgment of the Supreme Court of Florida.

2. **Federal Rules of Civil Procedure.** In *Foman* v. *Davis*, 371 U.S. 178; 9 L.Ed. 2d 222; 83 S.Ct. 227 (1962), the District Court entered judgment dismissing Petitioner's complaint, whereupon Petitioner filed a motion to vacate the judgment and to amend. Prior to the District Court's ruling on the motion to vacate and to amend, the Petitioner filed an appeal to the Court of Appeals. Thereafter the District Court denied the motion to vacate and to amend, and Petitioner then filed an appeal from the latter judgment. The Court of Appeals ruled that

the first appeal was premature and therefore ineffective, and that the second appeal was therefore also ineffective because it failed to specify that it was an appeal from the original judgment dismissing the complaint as well as an appeal from the second judgment denying the motion to vacate and to amend. On certiorari, this Court reversed, holding that:

> "The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeals papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to reply on appeal, submitted to both respondent and the court, pursuant to the rule, similarly demonstrated the intent to challenge the dismissal.
>
> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." 371 U.S. 178, 181; 9 L.Ed. 2d 222, 225.

So in the case at bar, Appellee has not been mislead or prejudiced, and Appellee has in no way suggested any

such prejudice in its Motion. Taking into consideration all other aspects of the Notice to Appeal, together with the subsequent motion for extension of time to file the jurisdictional statement, the order thereon, and the jurisdictional statement itself, Appellant's intention to seek review of the judgment of the Supreme Court of Florida herein is manifest.

3. **Federal Rules of Criminal Procedure.** In *Lemke* v. *United States*, 346 U.S. 325; 98 L.Ed. 3; 74 S.Ct. 1 (1953), an appeal had been taken prior to the entry of the judgment of the District Court. This Court, in construing Rule 37 (as it then read) held that even though the notice of appeal was prematurely filed, the appeal should not be dismissed where the notice was still on file on the date of entry of the judgment. The Court disregarded the defect as one which did not affect substantial rights.

In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593; 95 L.Ed. 1199; 71 S.Ct. 971 (1951), the appellant had filed 206 assignments of error, and the appellee had moved to dismiss. The Court, however, stated that while the filing of an excessive number of assignments of error could justify dismissal, it nevertheless denied the appellee's motion. So in the case at bar, Appellant submits that the Court is not compelled by Rule 10, because of the oversight in question, to dismiss the appeal, but has ample discretion in the premises to treat it as harmless error.

Like results have been reached by the Courts of Appeal in their construction of Rule 37. Thus, *United States* v. *Blue*, 350 F. 2d 267 (9th Cir., 1965), presented a situation converse to that at bar, i.e., the notice of appeal failed to

state the name of the court to which the appeal was taken. However, the notice complied in all other respects with Rule 37 and the court stated: "This is precisely the sort of technical objection that the Rules were designed to eliminate." 350 F. 2d 267, 270. *Accord: United States* v. *Duncan*, 310 F. 2d 367 (7th Cir., 1962), where the court treated a letter by an indigent defendant to the clerk as a notice of appeal, did not require compliance with all "technical niceties", and held that there was *substantial compliance* with Rule 37. *Cf. United States* v. *Cannady*, 34 F.R.D. 211, 212 (D.C., 1964), where Judge Youngdahl referred to certain irregularities as simply "inconsequential omissions."

4. **State law.** In the recent case of *State ex rel. Poe* v. *Allen*, 196 So.2d 745, the Supreme Court of Florida on March 8, 1967, resolved a substantially identical problem in favor of the appellant therein. The notice of appeal had been addressed to a concededly non-appealable order denying a motion for a new trial, rather than to the final judgment itself. The Supreme Court of Florida held that the technical omission did not serve to defeat the appeal, since the appellees had not shown that they were prejudiced thereby. The Court stated that:

> "the defective notice contains information by use of which the matter appealed can be discovered in the record with at least the reasonable degree of certainty required by . . . preceding rulings." 196 So.2d 745, 746.

The Court added that:

> "The significant factors . . . . are proper indentification of the litigation in the notice, a clear intent

to prosecute an effective appeal, specification of errors reviewable only upon appeal from the final judgment, presentation of a record sustaining such an appeal, and the absence of any record basis for genuine prejudice as a result of the defective notice." 196 So.2d 745, 746.

The Court relied upon the more liberal view now obtaining in other jurisdictions, and in particular upon the rule prevailing in Federal courts, citing Barron & Holtzoff, Federal Practice and Procedure, viz.:

> "Where the appeal is erroneously taken from the order denying the motion, rather than from judgment, the sound course undoubtedly is to treat the technical error as harmless, and to consider the appeal as if it were from the judgment * * *" Vol. 3, p. 347, Sec. 1302.01.

CONCLUSION

Appellant submits, *in fine*, that the Motion to Dismiss in no way suggests that the Federal Question presented on the merits is insubstantial, but relies solely upon a non-prejudicial technicality. As the Court stated long ago in *Mutual Life Insurance Company* v. *Phinney*, 178 U.S. 327, 337; 44 L.Ed. 1088, 1093 (1900):

> "While we have always been careful to see that the required order of procedure has been complied with before any case shall be considered as transfered from a lower to a higher court that the party seeking a review must act in time and must make a substantial compliance with all that the

> statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction."

For the foregoing reasons, therefore, Appellant respectfully prays the Court to deny the Motion to Dismiss.

Respectfully submitted,

By_____

ALFRED I. HOPKINS
1701 Meridan Avenue
Miami Beach, Florida

IRMA ROBBINS FEDER
110 N. Hibiscus Drive
Miami Beach, Florida

RICHARD YALE FEDER
1099 Ponce de Leon Boulevard
Coral Gables, Florida
Attorneys for Appellant

MAURICE ROSEN
1624 N. E. 19th Avenue
North Miami Beach, Florida
Of Counsel

CERTIFICATE OF SERVICE

I, ALFRED I. HOPKINS, Counsel for Appellant and a member of the Bar of the Supreme Court of the United States, hereby certify that on May ____, 1967, I served a copy of the foregoing Appellant's Response to Motion to Dismiss Appeal on the Appellee by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Hon. Earl Faircloth, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

ALFRED I. HOPKINS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

DELANEY *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 1213. Decided May 29, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.